

(f) A propounding party asserting that a responding party has provided an inadequate or insufficient response to a Commission-ordered discovery request may file a motion to compel within ten days of the service of such response, or as otherwise directed by Commission staff, pursuant to the requirements of § 14.45 of this subpart.

(g) The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that provides:

(1) Indexing by useful identifying information about the documents; and

(2) Technology that allows staff to annotate the index so as to make the format an efficient means of reviewing the documents.

(h) The Commission may allow additional discovery, including, but not limited to, document production, depositions and/or additional interrogatories. In its discretion, the Commission may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines.

§ 14.48 Confidentiality of information produced or exchanged by the parties.

(a) Any materials generated in the course of a formal complaint proceeding may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1) through (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(b) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff; and

(5) Court reporters and stenographers in accordance with the terms and conditions of this section.

(c) These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(d) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(e) Upon termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

§ 14.49 Other required written submissions.

(a) The Commission may, in its discretion, or upon a party's motion showing good cause, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence.

(b) Unless otherwise directed by the Commission, all briefs shall include all legal and factual claims and defenses previously set forth in the complaint, answer, or any other pleading submitted in the proceeding. Claims and defenses previously made but not reflected in the briefs will be deemed abandoned. The Commission may, in its discretion, limit the scope of any briefs to certain subjects or issues. A party shall attach to its brief copies of all documents, data compilations, tangible things, and affidavits upon which such party relies or intends to rely to support the facts alleged and legal arguments made in its brief and such brief shall contain a full explanation of how each attachment is relevant to the issues and matters in dispute. All such attachments to a brief shall be documents, data compilations or tangible things, or affidavits made by persons, that were identified by any party in its information designations filed pursuant to §§ 14.39(a)(10)(i), (a)(10)(ii), 14.27(f)(1), (f)(2), and 14.44(d)(1), (d)(2) of this subpart. Any other supporting documentation or affidavits that are attached to a brief must be accompanied by a full explanation of the relevance of such materials and why such materials were not identified in the information designations. These briefs shall contain the proposed findings of fact and conclusions of law which the filing party is urging the Commission to adopt, with specific citation to the record, and supporting relevant authority and analysis.

(c) In cases in which discovery is not conducted, absent an order by the Commission that briefs be filed, parties may not submit briefs. If the Commission does authorize the filing of briefs in cases in which discovery is not conducted, briefs shall be filed concurrently by both the complainant and defendant at such time as designated by the Commission staff and in accordance with the provisions of this section.

(d) In cases in which discovery is conducted, briefs shall be filed concurrently by both the complainant and defendant at such time designated by the Commission staff.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under § 14.48 of this subpart shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall also be filed with the Commission for inclusion in the public file. Edited versions shall be filed within five days from the date the unedited brief is submitted, and served on opposing parties.

(f) Initial briefs shall be no longer than twenty-five pages. Reply briefs shall be no longer than ten pages. Either on its own motion or upon proper motion by a party, the Commission staff may establish other page limits for briefs.

(g) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

(h) The parties shall submit a joint statement of stipulated facts, disputed facts, and key legal issues no later than two business days prior to the initial status conference, scheduled in accordance with the provisions of § 14.50(a) of this subpart.

§ 14.50 Status conference.

(a) In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. Unless otherwise ordered by the Commission, an initial status conference shall take place, at the time and place designated by the Commission staff, ten business days after the date the answer is due to be filed. A status conference may include discussion of:

- (1) Simplification or narrowing of the issues;
- (2) The necessity for or desirability of additional pleadings or evidentiary submissions;
- (3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;
- (4) Settlement of all or some of the matters in controversy by agreement of the parties;
- (5) Whether discovery is necessary and, if so, the scope, type and schedule for such discovery;
- (6) The schedule for the remainder of the case and the dates for any further status conferences; and
- (7) Such other matters that may aid in the disposition of the complaint.

(b)(1) Parties shall meet and confer prior to the initial status conference to discuss:

- (i) Settlement prospects;
  - (ii) Discovery;
  - (iii) Issues in dispute;
  - (iv) Schedules for pleadings;
  - (v) Joint statement of stipulated facts, disputed facts, and key legal issues; and
- (2) Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff at least two business days prior to the scheduled initial status conference.

(c) In addition to the initial status conference referenced in paragraph (a) of this section, any party may also request that a conference be held at any time after the complaint has been filed.

(d) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of

interlocutory matters relevant to the conduct of a formal complaint proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials.

(e) Parties may make, upon written notice to the Commission and all attending parties at least three business days prior to the status conference, an audio recording of the Commission staff's summary of its oral rulings. Alternatively, upon agreement among all attending parties and written notice to the Commission at least three business days prior to the status conference, the parties may make an audio recording of, or use a stenographer to transcribe, the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, as well as the Commission staff's summary of its oral rulings. A complete transcript of any audio recording or stenographic transcription shall be filed with the Commission as part of the record, pursuant to the provisions of paragraph (f)(2) of this section. The parties shall make all necessary arrangements for the use of a stenographer and the cost of transcription, absent agreement to the contrary, will be shared equally by all parties that agree to make the record of the status conference.

(f) The parties in attendance, unless otherwise directed, shall either:

(1) Submit a joint proposed order memorializing the oral rulings made during the conference to the Commission by 5:30 pm, Eastern Time, on the business day following the date of the status conference, or as otherwise directed by Commission staff. In the event the parties in attendance cannot reach agreement as to the rulings that were made, the joint proposed order shall include the rulings on which the parties agree, and each party's alternative proposed rulings for those rulings on which they cannot agree. Commission staff will review and make revisions, if necessary, prior to signing and filing the submission as part of the record. The proposed order shall be submitted both as hard copy and on computer disk in accordance with the requirements of § 14.51(d) of this subpart; or

(2) Pursuant to the requirements of paragraph (e) of this section, submit to the Commission by 5:30 pm., Eastern Time, on the third business day following the status conference or as otherwise directed by Commission staff either:

(i) A transcript of the audio recording of the Commission staff's summary of its oral rulings;

(ii) A transcript of the audio recording of the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, and the Commission staff's summary of its oral rulings; or

(iii) A stenographic transcript of the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, and the Commission staff's summary of its oral rulings.

(g) Status conferences will be scheduled by the Commission staff at such time and place as it may designate to be conducted in person or by telephone conference call.

(h) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver by that party and will not preclude the Commission staff from conferring with those parties and/or counsel present.

§ 14.51 Specifications as to pleadings, briefs, and other documents; subscription.

(a) All papers filed in any formal complaint proceeding must be drawn in conformity with the

requirements of §§ 1.49 and 1.50 of this chapter.

(b) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(c) The original of all pleadings and other submissions filed by any party shall be signed by the party, or by the party's attorney. The signing party shall include in the document his or her address, telephone number, facsimile number and the date on which the document was signed. Copies should be conformed to the original. Unless specifically required by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed solely for purposes of delay or for any other improper purpose.

(d) All proposed orders shall be submitted both as hard copies and on computer disk formatted to be compatible with the Commission's computer system and using the Commission's current word processing software. Each disk should be submitted in "read only" mode. Each disk should be clearly labeled with the party's name, proceeding, type of pleading, and date of submission. Each disk should be accompanied by a cover letter. Parties who have submitted copies of tariffs or reports with their hard copies need not include such tariffs or reports on the disk. Upon showing of good cause, the Commission may waive the requirements of this paragraph.

§ 14.52 Copies; service; separate filings against multiple defendants.

(a) Complaints may generally be brought against only one named defendant; such actions may not be brought against multiple defendants unless the defendants are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

(b) The complainant shall file an original copy of the complaint and, on the same day:

(1) File three copies of the complaint with the Office of the Commission Secretary;

(2) Serve two copies on the Enforcement Bureau;

and

(3) If a complaint is addressed against multiple defendants, file three copies of the complaint with the Office of the Commission Secretary for each additional defendant.

(c) Generally, a separate file is set up for each defendant. An original plus two copies shall be filed of all pleadings and documents, other than the complaint, for each file number assigned.

(d) The complainant shall serve the complaint by hand delivery on either the named defendant or one of the named defendant's registered agents for service of process on the same date that the complaint is filed with the Commission in accordance with the requirements of paragraph (b) of this section.

(e) Upon receipt of the complaint by the Commission, the Commission shall promptly send, by facsimile transmission to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall send, by regular U.S. mail delivery, to each defendant named in the complaint, a copy of the complaint. The Commission shall additionally send, by regular U.S. mail to all parties, a schedule detailing the date the answer will be due and the date, time and location of the initial status conference.

(f) All subsequent pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents or other written submissions, shall be served by the filing party on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or by facsimile transmission followed by regular U.S. mail delivery, together with a proof of such service in accordance with the requirements of § 1.47(g) of this chapter. Service is deemed effective as follows:

(1) Service by hand delivery that is delivered to the office of the recipient by 5:30 pm, local time of the recipient, on a business day will be deemed served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 pm, local time of the recipient, on a business day will be deemed served on the following business day;

(2) Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service such as, or comparable to, the US Postal Service Express Mail, United Parcel Service or Federal Express; or

(3) Service by facsimile transmission that is fully transmitted to the office of the recipient by 5:30 pm, local time of the recipient, on a business day will be deemed served that day. Service by facsimile transmission that is fully transmitted to the office of the recipient after 5:30 pm, local time of the recipient, on a business day will be deemed served on the following business day.

(g) Supplemental complaint proceedings. Supplemental complaints filed pursuant to § 14.39 of this subpart shall conform to the requirements set out in this section, except that the complainant need not submit a filing fee, and the complainant may effect service pursuant to paragraph (f) of this section rather than paragraph (d) of this section numerals.

**APPENDIX C****Proposed Rules**

**The Federal Communications Commission proposes to amend Part 14 of Title 47 of the Code of Federal Regulations as follows:**

**Part 14 of Title 47 of the Code of Federal Regulations is amended as follows:**

1. The authority citation for Part 14 reads as follows:

AUTHORITY: 47 U.S.C. 151, 154(i), 154(j), 208, 255, 617, 618.

2. The Federal Communications Commission proposes amending Part 14 by adding new Subpart E.

\*\*\*\*\*

**Subpart E – Internet Browsers Built Into Telephones Used With Public Mobile Services.**

**§ 14.60 Internet Browsers built into Mobile Phones.**

(a) Accessibility- If a manufacturer of a telephone used with public mobile services (as such term is defined in Section 710(b)(4)(B) of the Act) includes an Internet browser in such telephone, or if a provider of mobile service arranges for the inclusion of a browser in telephones to sell to customers, the manufacturer or provider shall ensure that the functions of the included browser (including the ability to launch the browser) are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable, except that this subpart shall not impose any requirement on such manufacturer or provider--

- (1) to make accessible or usable any Internet browser other than a browser that such manufacturer or provider includes or arranges to include in the telephone; or
- (2) to make Internet content, applications, or services accessible or usable (other than enabling individuals with disabilities to use an included browser to access such content, applications, or services).

(b) Industry Flexibility- A manufacturer or provider may satisfy the requirements of this subpart with respect to such telephone or services by--

- (1) ensuring that the telephone or services that such manufacture or provider offers is accessible to and usable by individuals with disabilities without the use of third party applications, peripheral devices, software, hardware, or customer premises equipment; or
- (2) using third party applications, peripheral devices, software, hardware, or customer premises equipment that is available to the consumer at nominal cost and that individuals with disabilities can access.

AUTHORITY: 47 U.S.C. 151, 154(i), 154(j), 208, 255, 617, 618, 619



## APPENDIX D

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>1</sup> an Initial Regulatory Flexibility Analysis (“IRFA”) was included in the *Accessibility NPRM* in CG Docket No. 10-213, WT Docket No. 96-198, and CG Docket No. 10-145.<sup>2</sup> The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.<sup>3</sup>

**B. Need for, and Objectives of, the Report and Order**

2. The *Report and Order* implements Congress’ mandate that people with disabilities have access to advanced communications services (“ACS”) and ACS equipment. Specifically, these rules implement Sections 716 and 717 of the Communications Act of 1934, as amended, which were added by the “Twenty-First Century Communications and Video Accessibility Act of 2010” (“CVAA”).<sup>4</sup> Given the fundamental role ACS plays in today’s world, the Commission believes the CVAA represents the most significant legislation for people with disabilities since the passage of the Americans with Disabilities Act of 1990 (“ADA”).<sup>5</sup> The inability to access communications equipment and services can be life-threatening in emergency situations, can severely limit educational and employment opportunities, and can otherwise interfere with full participation in business, family, social, and other activities.

3. The *Report and Order* implements the requirements of Section 716 of the Act, which requires providers of ACS and manufacturers of equipment used for ACS to make their products accessible to people with disabilities, unless accessibility is not achievable.<sup>6</sup> The Commission also adopts rules to implement Section 717 of the Act, which requires the Commission to establish new recordkeeping and enforcement procedures for manufacturers and providers subject to Sections 255, 716 and 718.<sup>7</sup>

4. The *Report and Order* applies to ACS, which includes interconnected VoIP, non-interconnected VoIP, electronic messaging service, and interoperable video conferencing service.<sup>8</sup> The *Report and Order* requires manufacturers and service providers subject to Section 716 to comply with the requirements of Section 716 either by building accessibility features into their equipment or service or by

---

<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601–12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Amendments to the Commission’s Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, Notice of Proposed Rulemaking, 26 FCC Rcd 3133, 3219 App.C (2010) (“*Accessibility NPRM*”).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> Pub. L. No. 111-260, § 104.

<sup>5</sup> Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213).

<sup>6</sup> See 47 U.S.C. § 617.

<sup>7</sup> See 47 U.S.C. § 618.

<sup>8</sup> 47 U.S.C. § 153(53).

relying on third party applications or other accessibility solutions. If accessibility is not achievable by building in accessibility or relying on third party applications or other accessibility solutions, manufacturers and service providers must make their products compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, unless that is not achievable.

5. The *Report and Order* holds entities that make or produce end user equipment, including tablets, laptops, and smartphones, responsible for the accessibility of the hardware and manufacturer-installed software used for e-mail, SMS text messaging, and other ACS. The *Report and Order* also holds these entities responsible for software upgrades made available by such manufacturers for download by users. Additionally, the *Report and Order* concludes that, except for third party accessibility solutions, there is no liability for a manufacturer of end user equipment for the accessibility of software that is installed or downloaded by a user or made available for use in the cloud.

6. The *Report and Order* requires manufacturers and service providers to consider performance objectives at the design stage as early and consistently as possible and implement such evaluation to the extent that it is achievable. The *Report and Order* incorporates into the performance objectives the outcome-oriented definitions of “accessible,” “compatibility,” and “usable” contained in the rules regarding the accessibility of telecommunications services and equipment. The *Report and Order* adopts the four statutory factors to determine achievability. The *Report and Order* further expands on the fourth achievability factor – the extent to which an offering has varied functions, features, and prices – by allowing entities to not consider what is achievable with respect to every product, if such entity offers consumers with the full range of disabilities varied functions, features, and prices.

7. The *Report and Order* also establishes processes for providers of ACS and ACS equipment manufacturers to seek waivers of the Section 716 obligations, both individual and class, for offerings which are designed for multiple purposes but are designed primarily for purposes other than using ACS. The *Report and Order* clarifies what constitutes “customized equipment or services” for purposes of an exclusion of the Section 716 requirements. Pointing to an insufficient record upon which to grant a permanent exemption for small entities, the *Report and Order* also temporarily exempts all manufacturers of ACS equipment and all providers of ACS from the obligations of Section 716 if they qualify as small business concerns under the Small Business Administration’s (“SBA”) rules and size standards for the industry in which they are primarily engaged.

8. Specifically, the *Report and Order* adopted for this temporary exemption the SBA’s maximum size standards that are used to determine whether a business concern qualifies as a small business concern in its primary industry.<sup>9</sup> These size standards are based on the maximum number of employees or maximum annual receipts of a business concern.<sup>10</sup> The SBA categorizes industries for its size standards using the North American Industry Classification System (“NAICS”), a “system for classifying establishments by type of economic activity.”<sup>11</sup> The *Report and Order* identified some NAICS codes for possible primary industry classifications of ACS equipment manufacturers and ACS providers and the relevant SBA size standards associated with the codes.<sup>12</sup>

---

<sup>9</sup> See 13 C.F.R. § 121.201.

<sup>10</sup> 13 C.F.R. § 121.106 (describing how number of employees is calculated); 13 C.F.R. § 121.104 (describing how annual receipts is calculated).

<sup>11</sup> North American Industry Classification System; Revision for 2012, 76 Fed. Reg. 51240 (Aug. 17, 2011) (“*NAICS Final Decision*”).

<sup>12</sup> This is not a comprehensive list of the primary industries and associated SBA size standards of every possible manufacturer of ACS equipment or provider of ACS. This list is merely representative of some primary industries in which entities that manufacture ACS equipment or provide ACS may be primarily engaged. It is ultimately up to (continued....)

	NAICS Classification <sup>13</sup>	NAICS Code	SBA Size Standard <sup>14</sup>
Services <sup>15</sup>	Wired Telecommunications Carriers	517110	1,500 or fewer employees
	Wireless Telecommunications Carriers (except satellites)	517210	1,500 or fewer employees
	Telecommunications Resellers	517911	1,500 or fewer employees
	All Other Telecommunications	517919	\$25 million or less in annual receipts
	Software Publishers	511210	\$25 million or less in annual receipts
	Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees
	Data Processing, Hosting, and Related Services	518210	\$25 million or less in annual receipts
Equipment <sup>16</sup>	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	334220	750 or fewer employees
	Electronic Computer Manufacturing	334111	1,000 or fewer employees
	Telephone Apparatus Manufacturing	334210	1,000 or fewer employees
	Other Communications Equipment Manufacturing	334290	750 or fewer employees
	Software Publishers	511210	\$25 million or less in annual receipts
	Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees

9. As stated above, the *Report and Order* indicated that this temporary exemption is self-executing. Under this approach, covered entities must determine whether they qualify for the exemption based upon their ability to meet the SBA's rules and the size standard for the relevant NAICS industry category for the industry in which they are primarily engaged. Entities that manufacture ACS equipment or provide ACS may raise this temporary exemption as a defense in an enforcement proceeding. Entities claiming the exemption must be able to demonstrate that they met the exemption criteria during the estimated start of the design phase of the lifecycle of the product or service that is the subject of the complaint. The *Report and Order* stated that if an entity no longer meets the exemption criteria, it must

(Continued from previous page) \_\_\_\_\_

an entity seeking the temporary exemption to make a determination regarding their primary industry, and justify such determination in any enforcement proceeding.

<sup>13</sup> The definitions for each NAICS industry classification can be found by entering the six digit NAICS code in the "2007 NAICS Search" function available at the NAICS homepage, <http://www.census.gov/eos/www/naics/index.html>. The U.S. Office of Management and Budget has revised NAICS for 2012, however, the codes and industry categories listed herein are unchanged. OMB anticipates releasing a 2012 NAICS UNITED STATES MANUAL or supplement in January 2012. See *NAICS Final Decision*, 76 Fed. Reg. at 51240.

<sup>14</sup> See 13 C.F.R. § 121.201 for a full listing of SBA size standards by six-digit NAICS industry code. The standards listed in this column establish the maximum size an entity in the given NAICS industry may be to qualify as a small business concern.

<sup>15</sup> See accompanying *Report and Order* at Section III.A.

<sup>16</sup> See accompanying *Report and Order* at Section III.A.

comply with Section 716 and Section 717 for all subsequent products or services or substantial upgrades of products or services that are in the development phase of the product or service lifecycle, or any earlier stages of development, at the time they no longer meet the criteria.

10. The *Report and Order* indicated that such an exemption was necessary to avoid the possibility of unreasonably burdening “small and entrepreneurial innovators and the significant value that they add to the economy. The *Report and Order* states that the temporary exemption enables us to provide relief to those entities that may possibly lack legal, financial, or technical capability to comply with the Act until we further develop the record to determine whether small entities should be subject to a permanent exemption and, if so, the criteria to be used for defining which small entities should be subject to such permanent exemption. The temporary exemption will begin on the effective date of the rules adopted in the *Report and Order*<sup>17</sup> and will expire the earlier of the effective date of small entity exemption rules adopted pursuant to the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) or October 8, 2013.

11. The Commission establishes procedures in the *Report and Order* to facilitate the filing of formal and informal complaints, including a discretionary pre-filing notice procedure to facilitate dispute resolution: as a prerequisite to filing an informal complaint, complainants must first file a “Request for Dispute Assistance” with the Consumer and Governmental Affairs Bureau’s Disability Rights Office. In addition, under the rules adopted in the *Report and Order*, manufacturers and providers subject to Section 716 and Section 255 must maintain records of (1) their efforts to consult with people with disabilities; (2) descriptions of the accessibility features of their products and services; and (3) information about the compatibility of their products with peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access. The *Report and Order* also reminds covered entities that, while the Commission does not require them to create and maintain any particular records to claim a defense that it is not achievable for them to make their products or services accessible, they bear the burden of proof on this defense.

**C. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA and Summary of the Assessment of the Agency of Such Issues**

12. In response to the *Accessibility NPRM*, one commenter addressed the proposed rules and policies implicated in the IRFA. NTCA requests that the Commission adopt an exemption for small entities from the obligations of Section 716 and the Commission’s rules implementing Section 716 for small telecommunications carriers as defined by the SBA.<sup>18</sup> Alternatively, NTCA requests a waiver process for small entities to seek and qualify for a waiver.<sup>19</sup> NTCA argues that small telecommunications companies “lack the size and resources to influence the design or features of equipment . . . [and] the purchasing power to enable them to buy equipment in bulk for a reduced price, or to compel sufficient production to ensure that compliant equipment ‘trickles down’ to smaller purchasers within a specific timeframe.”<sup>20</sup>

13. As explained in the *Report and Order*, we lack a sufficient record upon which to base a permanent exemption for small entities. However, we believe that some relief is necessary for entities that may be unreasonably burdened by conducting an achievability analysis and complying with the recordkeeping and certification requirements as necessary under the Act and in accordance with the *Report and Order*. Therefore, we exercise our discretion under the Act to temporarily exempt from the obligations of Section 716 providers of ACS and manufacturers of ACS equipment that qualify as small

<sup>17</sup> See accompanying *Report and Order* at Section III.A.5.

<sup>18</sup> NTCA Comments at 2.

<sup>19</sup> NTCA Comments at 2.

<sup>20</sup> NTCA Comments at 3.

business concerns under the applicable SBA rules and size standards, and seek further comment on whether to exercise our authority to grant a permanent small entity exemption in the accompanying *Further Notice*, and if so, what criteria we should apply for defining which small entities should be subject to such permanent exemption. As such, the *Report and Order* extends temporary relief to all small business concerns that would otherwise have to comply with the Act.

**D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply**

14. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that face possible significant economic impact by the adoption of proposed rules.<sup>21</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>22</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>23</sup> A “small business concern” is one that (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>24</sup>

15. To assist the Commission in analyzing the total number of small entities potentially affected by the proposals in the *Further Notice*, we ask commenters to estimate the number of small entities that may be affected. To assist in assessing the nature and number of small entities that face possible significant economic impact by the proposals in the *Further Notice*, we seek comment on the industry categories below and our estimates of the entities in each category that can, under relevant SBA standards or standards previously approved by the SBA for small businesses, be classified as small. Where a commenter proposes an exemption from the requirements of Section 716 and in effect Section 717, we also seek estimates from that commenter on the number of small entities in each category that would be exempted from compliance with Section 716 and in effect Section 717 under the proposed exemption, the percentage of market share for the service or product that would be exempted, and the economic impact, if any, on those entities that are not covered by the proposed exemption. While the *Further Notice* and this IRFA seek comment on whether and how the Commission should permanently exempt small entities from the requirements of Section 716 and in effect Section 717 for the purposes of building a record on that issue, we will assume, for the narrow purpose of including a thorough regulatory impact analysis in this IRFA, that no such exemptions will be provided.

16. Many of the issues raised in the *Further Notice* relate to clarifying obligations on entities already covered by the *Report and Order*, which may affect a broad range of service providers and equipment manufacturers. The *Further Notice* seeks comment on making permanent a temporary exemption for small entities that qualify as small business concerns under the SBA’s rules and small business size standards, or some other criteria. Therefore, it is possible that all entities that would be required to comply with Section 716 and Section 717, but are small business concerns or qualify as small entities under some other criteria, will be exempt from the provisions of the proposed rules implementing Section 716 and Section 717. The CVAA, however, does not provide the flexibility for the Commission to adopt an exemption for small entities from compliance with Section 718. Therefore, we estimate below the impact on small entities absent a permanent exemption from Section 716 and Section 717, and

---

<sup>21</sup> 5 U.S.C. § 604(a)(3).

<sup>22</sup> 5 U.S.C. § 601(6).

<sup>23</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>24</sup> 15 U.S.C. § 632.

small entities that may have to comply with Section 718. Specifically, we analyze the number of small businesses engaged in manufacturing that may be affected by the *Further Notice*, absent a permanent small entity exemption, including manufacturers of equipment used to provide interconnected and non-interconnected VoIP, electronic messaging, and interoperable video conferencing services. We then analyze the number of small businesses engaged as service providers that may be affected by the *Report and Order*, absent a permanent small entity exemption, including providers of interconnected and non-interconnected VoIP, electronic messaging services, interoperable video conferencing services, wireless services, wireline services, and other relevant services.

17. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.<sup>25</sup> First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.<sup>26</sup> In addition, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>27</sup> Nationwide, as of 2007, there were approximately 1,621,315 small organizations.<sup>28</sup> Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>29</sup> Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.<sup>30</sup> We estimate that, of this total, as many as 88,506 entities may qualify as “small governmental jurisdictions.”<sup>31</sup> Thus, we estimate that most governmental jurisdictions are small.

#### 1. Equipment Manufacturers

##### a. Manufacturers of Equipment to Provide VoIP

18. Entities manufacturing equipment used to provide interconnected VoIP, non-interconnected VoIP, or both are generally found in one of two Census Bureau categories, “Electronic Computer Manufacturing”<sup>32</sup> or “Telephone Apparatus Manufacturing.”<sup>33</sup> We include here an analysis of

<sup>25</sup> See 5 U.S.C. §§ 601(3)–(6).

<sup>26</sup> See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (last visited May 6, 2011) (figures are from 2009).

<sup>27</sup> 5 U.S.C. § 601(4).

<sup>28</sup> INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

<sup>29</sup> 5 U.S.C. § 601(5).

<sup>30</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

<sup>31</sup> The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 small governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,125. If we make the same assumption about special districts, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 special districts. Therefore, of the 89,476 small governmental organizations documented in 2007, as many as 89,506 may be considered small under the applicable standard. This data may overestimate the number of such organizations that has a population of 50,000 or less. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (data cited therein are from 2007).

<sup>32</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334111 Electronic Computer Manufacturing, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334111&search=2007%20NAICS%20Search>.

<sup>33</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

the possible significant economic impact of our proposed rules on manufacturers of equipment used to provide both interconnected and non-interconnected VoIP because it is not possible to separate available data on these two manufacturing categories for VoIP equipment. Our estimates below likely greatly overstate the number of small entities that manufacture equipment used to provide ACS, including interconnected VoIP. However, in the absence of more accurate data, we present these figures to provide as thorough an analysis of the impact on small entities as possible.

19. *Electronic Computer Manufacturing.* The Census Bureau defines this category to include “establishments primarily engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops, and computer servers. Computers can be analog, digital, or hybrid . . . The manufacture of computers includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product.”<sup>34</sup>

20. In this category, the SBA deems an electronic computer manufacturing business to be small if it has 1,000 employees or less.<sup>35</sup> For this category of manufacturers, Census data for 2007 show that there were 421 establishments that operated that year. Of those 421, 384 had 100 or fewer employees and 37 had 100 or more employees.<sup>36</sup> On this basis, we estimate that the majority of manufacturers of equipment used to provide electronic messaging services in this category are small.

21. *Telephone Apparatus Manufacturing.* The Census Bureau defines this category to comprise “establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways.”<sup>37</sup>

22. In this category, the SBA deems a telephone apparatus manufacturing business to be small if it has 1,000 or fewer employees.<sup>38</sup> For this category of manufacturers, Census data for 2007 shows there were 398 such establishments in operation.<sup>39</sup> Of those 398 establishments, 393 (approximately 99%) had 1,000 or fewer employees and, thus, would be deemed small under the applicable SBA size standard.<sup>40</sup> On this basis, the Commission estimates that approximately 99% or more of the manufacturers of equipment used to provide VoIP in this category are small.

#### **b. Manufacturers of Equipment to Provide Electronic Messaging**

23. Entities that manufacture equipment (other than software) used to provide electronic messaging services are generally found in one of three Census Bureau categories: “Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing,”<sup>41</sup> “Electronic Computer

<sup>34</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334111 Electronic Computer Manufacturing, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334111&search=2007%20NAICS%20Search>.

<sup>35</sup> 13 C.F.R. 121.201, NAICS Code 334111.

<sup>36</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=300&-ds\\_name=EC0731I1&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=300&-ds_name=EC0731I1&-_lang=en)

<sup>37</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

<sup>38</sup> 13 C.F.R. § 121.201, NAICS Code 334210.

<sup>39</sup> U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334210 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

<sup>40</sup> *Id.*

<sup>41</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334220 Radio and Television Broadcasting and Wireless Communications Equipment, <http://www.census.gov/econ/industry/def/d334220.htm>.

Manufacturing,”<sup>42</sup> or “Telephone Apparatus Manufacturing.”<sup>43</sup>

24. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.” The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 919 establishments in this category that operated for part or all of the entire year. Of this total, 771 had less than 100 employees and 148 had more than 100 employees.<sup>44</sup> Thus, under this size standard, the majority of firms can be considered small.

25. *Electronic Computer Manufacturing.* The Census Bureau defines this category to include “establishments primarily engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops, and computer servers. Computers can be analog, digital, or hybrid. . . . The manufacture of computers includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product.”<sup>45</sup>

26. In this category the SBA deems an electronic computer manufacturing business to be small if it has 1,000 or fewer employees.<sup>46</sup> For this category of manufacturers, Census data for 2007 show that there were 421 such establishments that operated that year. Of those 421 establishments, 384 had 1,000 or fewer employees.<sup>47</sup> On this basis, we estimate that the majority of the manufacturers of equipment used to provide electronic messaging services in this category are small.

27. *Telephone Apparatus Manufacturing.* The Census Bureau defines this category to comprise “establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be stand alone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways.”<sup>48</sup>

28. In this category the SBA deems a telephone apparatus manufacturing business to be small if it has 1,000 or fewer employees.<sup>49</sup> For this category of manufacturers, Census data for 2007 shows that

---

<sup>42</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334111 Electronic Computer Manufacturing, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334111&search=2007%20NAICS%20Search>.

<sup>43</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

<sup>44</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-fds\\_name=EC0700A1&-geo\\_id=&-\\_skip=300&-ds\\_name=EC0731I1&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=300&-ds_name=EC0731I1&-_lang=en).

<sup>45</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334111 Electronic Computer Manufacturing, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334111&search=2007%20NAICS%20Search>.

<sup>46</sup> 13 C.F.R. § 121.201, NAICS Code 334111.

<sup>47</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=300&-ds\\_name=EC0731I1&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=300&-ds_name=EC0731I1&-_lang=en).

<sup>48</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334210 Telephone Apparatus Manufacturing, <http://www.census.gov/naics/2007/def/ND334210.HTM>.

<sup>49</sup> 13 C.F.R. § 121.201, NAICS Code 334210.

there were 398 such establishments that operated that year.<sup>50</sup> Of those 398 establishments, 393 (approximately 99%) had 1,000 or fewer employees and, thus, would be deemed small under the applicable SBA size standard.<sup>51</sup> On this basis, the Commission estimates that approximately 99% or more of the manufacturers of equipment used to provide electronic messaging services in this category are small.

**c. Manufacturers of Equipment Used to Provide Interoperable Video Conferencing Services**

29. Entities that manufacture equipment used to provide interoperable and other video conferencing services are generally found in the Census Bureau category: “Other Communications Equipment Manufacturing.” The Census Bureau defines this category to include: “establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment).”<sup>52</sup>

30. *Other Communications Equipment Manufacturing.* In this category, the SBA deems a business manufacturing other communications equipment to be small if it has 750 or fewer employees.<sup>53</sup> For this category of manufacturers, Census data for 2007 show that there were 452 establishments that operated that year. Of the 452 establishments 406 had fewer than 100 employees and 46 had more than 100 employees. Accordingly, the Commission estimates that a substantial majority of the manufacturers of equipment used to provide interoperable and other video-conferencing services are small.<sup>54</sup>

**2. Service Providers**

**a. Providers of VoIP**

31. Entities that provide interconnected or non-interconnected VoIP or both are generally found in one of two Census Bureau categories, “Wired Telecommunications Carriers” or “All Other Telecommunications.”

32. *Wired Telecommunications Carriers.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>55</sup>

33. In this category, the SBA deems a wired telecommunications carrier to be small if it has

---

<sup>50</sup> U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334111 (rel. Nov. 16, 2010); <http://factfinder.census.gov>.

<sup>51</sup> *Id.*

<sup>52</sup> U.S. Census Bureau, 2007 NAICS Definitions, 334290 Other communications equipment manufacturing, <http://www.census.gov/econ/industry/def/d334290.htm>.

<sup>53</sup> 13 C.F.R. 121.201, NAICS Code 334220.

<sup>54</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=300&-ds\\_name=EC0731I1&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=300&-ds_name=EC0731I1&-_lang=en).

<sup>55</sup> U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/econ/industry/def/d517110.htm>.

1,500 or fewer employees.<sup>56</sup> Census data for 2007 shows 3,188 firms in this category<sup>57</sup> Of these 3,188 firms, only 44 had 1,000 or more employees. While we could not find precise Census data on the number of firms with in the group with 1,500 or fewer employees, it is clear that at least 3,144 firms with fewer than 1,000 employees would be in that group. On this basis, the Commission estimates that a substantial majority of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category, are small.<sup>58</sup>

34. *All Other Telecommunications.* Under the 2007 U.S. Census definition of firms included in the category “All Other Telecommunications (NAICS Code 517919)” comprises “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”<sup>59</sup>

35. In this category, the SBA deems a provider of “all other telecommunications” services to be small if it has \$25 million or less in average annual receipts.<sup>60</sup> For this category of service providers, Census data for 2007 shows that there were 2,383 such firms that operated that year.<sup>61</sup> Of those 2,383 firms, 2,346 (approximately 98%) had \$25 million or less in average annual receipts and, thus, would be deemed small under the applicable SBA size standard. On this basis, Commission estimates that approximately 98% or more of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category are small.<sup>62</sup>

#### **b. Providers of Electronic Messaging Services**

36. Entities that provide electronic messaging services are generally found in one of the following Census Bureau categories, “Wireless Telecommunications Carriers (except Satellites),” “Wired Telecommunications,” or “Internet Publishing and Broadcasting and Web Search Portals.”

37. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.<sup>63</sup> Prior to that time, such

<sup>56</sup> 13 C.F.R. § 121.201, NAICS Code 517110.

<sup>57</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-\\_skip=600&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>58</sup> *Id.* As noted in para. 18 above with regard to the distinction between manufacturers of equipment used to provide interconnected VoIP and manufactures of equipment to provide non-interconnected VoIP, our estimates of the number of the number of providers of non-interconnected VoIP (and the number of small entities within that group) are likely overstated because we could not draw in the data a distinction between such providers and those that provide interconnected VoIP. However, in the absence of more accurate data, we present these figures to provide as thorough an analysis of the impact on small entities as we can at this time.

<sup>59</sup> U.S. Census Bureau, 2007 NAICS Definitions, 517919 All Other Telecommunications, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

<sup>60</sup> 13 C.F.R. § 121.201, NAICS Code 517919.

<sup>61</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-\\_skip=900&-ds\\_name=EC0751SSSZ4&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en).

<sup>62</sup> See discussion *supra* note 58, regarding possible overestimation of firms and small entities providing non-interconnected VoIP services.

<sup>63</sup> U.S. Census Bureau, 2007 NAICS Definitions, 517210 Wireless Telecommunications Carriers (Except Satellite), <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”<sup>64</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>65</sup> For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.<sup>66</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (“PCS”), and Specialized Mobile Radio (“SMR”) Telephony services.<sup>67</sup> Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.<sup>68</sup> Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

38. *Wired Telecommunications Carriers.* For the 2007 US Census definition of firms included in the category, “Wired Telecommunications Carriers (NAICS Code 517110),” see paragraph 32 above.

39. In this category, the SBA deems a wired telecommunications carrier to be small if it has 1,500 or fewer employees.<sup>69</sup> Census data for 2007 shows 3,188 firms in this category.<sup>70</sup> Of these 3,188 firms, only 44 (approximately 1%) had 1,000 or more employees.<sup>71</sup> While we could not find precise Census data on the number of firms in the group with 1,500 or fewer employees, it is clear that at least the 3,188 firms with fewer than 1,000 employees would be in that group. Thus, at least 3,144 of these 3,188 firms (approximately 99%) had 1,500 or fewer employees. On this basis, the Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small.

40. *Internet Publishing and Broadcasting and Web Search Portals.* The Census Bureau defines this category to include “establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to

---

<sup>64</sup> U.S. Census Bureau, 2002 NAICS Definitions, 517211 Paging, <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

<sup>65</sup> 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>66</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>67</sup> See *Trends in Telephone Service*, at tbl. 5.3.

<sup>68</sup> *Id.*

<sup>69</sup> 13 C.F.R. § 121.201, NAICS Code 517110.

<sup>70</sup> U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 517110 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

<sup>71</sup> *Id.*

other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.”<sup>72</sup>

41. In this category, the SBA deems an Internet publisher or Internet broadcaster or the provider of a web search portal on the Internet to be small if it has 500 or fewer employees.<sup>73</sup> For this category of manufacturers, Census data for 2007 shows that there were 2,705 such firms that operated that year.<sup>74</sup> Of those 2,705 firms, 2,682 (approximately 99%) had 500 or fewer employees and, thus, would be deemed small under the applicable SBA size standard.<sup>75</sup> On this basis, the Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small.

42. *Data Processing, Hosting, and Related Services.* The Census Bureau defines this category to include “establishments primarily engaged in providing infrastructure for hosting or data processing services. These establishments may provide specialized hosting activities, such as web hosting, streaming services or application hosting; provide application service provisioning; or may provide general time-share mainframe facilities to clients. Data processing establishments provide complete processing and specialized reports from data supplied by clients or provide automated data processing and data entry services.”<sup>76</sup>

43. In this category, the SBA deems a data processing, hosting, or related services provider to be small if it has \$25 million or less in annual receipts.<sup>77</sup> For this category of providers, Census data for 2007 shows that there were 14,193 such establishments that operated that year.<sup>78</sup> Of those 14,193 firms, 12,985 had less than \$10 million in annual receipts, and 1,208 had greater than \$10 million.<sup>79</sup> Although no data is available to confirm the number of establishments with greater than \$25 million in receipts, the available data confirms the majority of establishments in this category were small. On this basis, the Commission estimates that approximately 96% of the providers of electronic messaging services in this category are small.

### c. Providers of Interoperable Video Conferencing Services

44. Entities that provide interoperable video conferencing services are found in the Census Bureau Category “All Other Telecommunications.”

45. *All Other Telecommunications.* For the 2007 US Census definition of firms included in the category, “All Other Telecommunications (NAICS Code 517919),” see paragraph 34 above.

46. In this category, the SBA deems a provider of “all other telecommunications” services to be small if it has \$25 million or less in average annual receipts.<sup>80</sup> Census data for 2007 show that there

<sup>72</sup> U.S. Census Bureau, 2007 NAICS Definitions, 519130 Internet Publishing and Broadcasting and Web Search Portals, <http://www.naics.com/censusfiles/ND519130.HTM>.

<sup>73</sup> 13 C.F.R. § 121.201, NAICS Code 519130.

<sup>74</sup> U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 519130 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

<sup>75</sup> *Id.*

<sup>76</sup> U.S. Census Bureau, 2007 NAICS Definition, 518210 Data Processing, Hosting, and Related Services, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>77</sup> 13 C.F.R. § 121.201; NAICS Code 518210.

<sup>78</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=800&-ds\\_name=EC0751SSSZ1&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=800&-ds_name=EC0751SSSZ1&-_lang=en).

<sup>79</sup> *Id.*

<sup>80</sup> 13 C.F.R. § 121.201, NAICS Code 517919.

were 2,383 such firms that operated that year.<sup>81</sup> Of those 2,383 firms, 2,346 (approximately 98%) had \$25 million or less in average annual receipts and, thus, would be deemed small under the applicable SBA size standard. On this basis, Commission estimates that approximately 98% or more of the providers of interoperable video conferencing services are small.

### 3. Additional Industry Categories.

#### a. Certain Wireless Carriers and Service Providers

47. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category “Wireless Telecommunications Carriers (except satellite).”<sup>82</sup> Under that SBA category, a business is small if it has 1,500 or fewer employees.<sup>83</sup> The census category of “Cellular and Other Wireless Telecommunications” is no longer used and has been superseded by the larger category “Wireless Telecommunications Carriers (except satellite).” The Census Bureau defines this larger category to include “establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.”<sup>84</sup>

48. Census data for 2007 shows 1,383 firms in this category.<sup>85</sup> Of these 1,383 firms, only 15 (approximately 1%) had 1,000 or more employees.<sup>86</sup> While there is no precise Census data on the number of firms the group with 1,500 or fewer employees, it is clear that at least the 1,368 firms with fewer than 1,000 employees would be found in that group. Thus, at least 1,368 of these 1,383 firms (approximately 99%) 1,500 or fewer employees. On this basis, Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small.

49. *Specialized Mobile Radio.* The Commission awards “small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>87</sup> The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.<sup>88</sup> The SBA has approved these small business size standards for the 900 MHz Service.<sup>89</sup> The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on

---

<sup>81</sup> [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-\\_skip=900&-ds\\_name=EC0751SSSZ4&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-lang=en).

<sup>82</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517210.

<sup>83</sup> *Id.*

<sup>84</sup> U.S. Census Bureau, 2007 NAICS Definitions, Wireless Telecommunications Carriers (Except Satellites) <http://www.census.gov/econ/industry/def/d517210.htm>.

<sup>85</sup> U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 517210 (rel. Nov. 19, 2010); <http://factfinder.census.gov>.

<sup>86</sup> *Id.*

<sup>87</sup> 47 C.F.R. § 90.814(b)(1).

<sup>88</sup> *Id.*

<sup>89</sup> See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.<sup>90</sup> A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 licenses. One bidder claiming small business status won five licenses.<sup>91</sup>

50. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders that won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed “small business” status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

51. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR services pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

52. *AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3)).* For the AWS-1 bands, the Commission has defined a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million.<sup>92</sup> In 2006, the Commission conducted its first auction of AWS-1 licenses.<sup>93</sup> In that initial AWS-1 auction, 31 winning bidders identified themselves as very small businesses.<sup>94</sup> Twenty-six of the winning bidders identified themselves as small businesses.<sup>95</sup> In a subsequent 2008 auction, the Commission offered 35 AWS-1 licenses.<sup>96</sup> Four winning bidders identified themselves as very small businesses, and three of the winning bidders identified themselves as a small business.<sup>97</sup> For AWS-2 and

<sup>90</sup> See *Correction to Public Notice DA 96-586, FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas*, Public Notice, 18 FCC Rcd 18367 (WTB 1996).

<sup>91</sup> See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

<sup>92</sup> See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order*, 18 FCC Rcd 25,162, App. B (2003), *modified by Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands, Order on Reconsideration*, 20 FCC Rcd 14,058, App. C (2005).

<sup>93</sup> See *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66*, AU Docket No. 06-30, Public Notice, 21 FCC Rcd 4562 (2006) (“*Auction 66 Procedures Public Notice*”).

<sup>94</sup> See *Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66*, Public Notice, 21 FCC Rcd 10,521 (2006) (“*Auction 66 Closing Public Notice*”).

<sup>95</sup> See *id.*

<sup>96</sup> See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd at 7499. Auction 78 also included an auction of broadband PCS licenses.

<sup>97</sup> See *Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period*, Public Notice, 23 FCC Rcd 12,749 (2008).

AWS-3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS-1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS-2 or AWS-3 bands but has proposed to treat both AWS-2 and AWS-3 similarly to broadband PCS service and AWS-1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.<sup>98</sup>

53. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order*, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>99</sup> A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>100</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>101</sup> SBA approval of these definitions is not required.<sup>102</sup> In 2000, the Commission conducted an auction of 52 Major Economic Area (“MEA”) licenses.<sup>103</sup> Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced and closed in 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>104</sup>

54. *Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.<sup>105</sup> On January 24, 2008, the

---

<sup>98</sup> *Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands et al.*, Notice of Proposed Rulemaking, 19 FCC Rcd 19,263, App. B (2005); *Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band*, Notice of Proposed Rulemaking, 22 FCC Rcd 17,035, App. (2007); *Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band*, Further Notice of Proposed Rulemaking, 23 FCC Rcd 9859, App. B (2008).

<sup>99</sup> *Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000). Service rules were amended in 2007, but no changes were made to small business size categories. See *Service Rules for the 698–746, 747–762 and 777–792 MHz Bands*, WT Docket No. 06–150, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94–102, *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, WT Docket No. 01–309, *Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, WT Docket 03–264, *Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 06–169, *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06–229, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket No. 96–86, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064 (2007).

<sup>100</sup> *Id.* at 5343 ¶ 108.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 5343 ¶ 108 n.246 (for the 746–764 MHz and 776–704 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain Small Business Administration approval before adopting small business size standards).

<sup>103</sup> See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (2000).

<sup>104</sup> See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

<sup>105</sup> *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.<sup>106</sup> The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years) and winning five licenses.

55. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.<sup>107</sup> The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>108</sup> A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>109</sup> Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—“entrepreneur”—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>110</sup> The SBA approved these small size standards.<sup>111</sup> An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) was conducted in 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won licenses.<sup>112</sup> A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses.<sup>113</sup> Seventeen winning bidders claimed small or very small business status, and nine winning bidders claimed entrepreneur status.<sup>114</sup> In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band. All three winning bidders claimed small business status.

56. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.<sup>115</sup> An auction of A, B and E block 700 MHz licenses was held in 2008.<sup>116</sup> Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

57. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico. There are presently approximately 55 licensees in this service. The Commission is

<sup>106</sup> See *Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

<sup>107</sup> See *Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59)*, Report and Order, 17 FCC Rcd 1022 (2002) (“*Channels 52–59 Report and Order*”).

<sup>108</sup> See *id.*, 17 FCC Rcd at 1087–88 ¶ 172.

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*, 17 FCC Rcd at 1088 ¶ 173.

<sup>111</sup> See *Alvarez Letter 1998*.

<sup>112</sup> See *Lower 700 MHz Band Auction Closes*, Public Notice, 17 FCC Rcd 17,272 (2002).

<sup>113</sup> See *Lower 700 MHz Band Auction Closes*, Public Notice, 18 FCC Rcd 11,873 (2003).

<sup>114</sup> See *id.*

<sup>115</sup> *700 MHz Second Report and Order*, Second Report and Order, 22 FCC Rcd 15,289, 15,359 n.434 (2007).

<sup>116</sup> See *Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (2008).

unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees. Census data for 2007 show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees.<sup>117</sup> Thus under this category and the associated small business size standard, the majority of firms can be considered small.

58. *Government Transfer Bands.* The Commission adopted small business size standards for the unpaired 1390-1392 MHz, 1670-1675 MHz, and the paired 1392-1395 MHz and 1432-1435 MHz bands.<sup>118</sup> Specifically, with respect to these bands, the Commission defined an entity with average annual gross revenues for the three preceding years not exceeding \$40 million as a "small business," and an entity with average annual gross revenues for the three preceding years not exceeding \$15 million as a "very small business."<sup>119</sup> SBA has approved these small business size standards for the aforementioned bands.<sup>120</sup> Correspondingly, the Commission adopted a bidding credit of 15 percent for "small businesses" and a bidding credit of 25 percent for "very small businesses."<sup>121</sup> This bidding credit structure was found to have been consistent with the Commission's schedule of bidding credits, which may be found at section 1.2110(f)(2) of the Commission's rules.<sup>122</sup> The Commission found that these two definitions will provide a variety of businesses seeking to provide a variety of services with opportunities to participate in the auction of licenses for this spectrum and will afford such licensees, who may have varying capital costs, substantial flexibility for the provision of services.<sup>123</sup> The Commission noted that it had long recognized that bidding preferences for qualifying bidders provide such bidders with an opportunity to compete successfully against large, well-financed entities.<sup>124</sup> The Commission also noted that it had

<sup>117</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>118</sup> See *Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands*, Report and Order, 17 FCC Rcd 9980 (2002).

<sup>119</sup> See *Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands*, WT Docket No. 02-8, Notice of Proposed Rulemaking, 17 FCC Rcd 2500, 2550-51 ¶¶ 144-146 (2002). To be consistent with the size standard of "very small business" proposed for the 1427-1432 MHz band for those entities with average gross revenues for the three preceding years not exceeding \$3 million, the Service Rules Notice proposed to use the terms "entrepreneur" and "small business" to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively. Because the Commission is not adopting small business size standards for the 1427-1432 MHz band, it instead uses the terms "small business" and "very small business" to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively.

<sup>120</sup> See Letter from Hector V. Barreto, Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 18, 2002.

<sup>121</sup> Such bidding credits are codified for the unpaired 1390-1392 MHz, paired 1392-1395 MHz, and the paired 1432-1435 MHz bands in 47 C.F.R. § 27.807. Such bidding credits are codified for the unpaired 1670-1675 MHz band in 47 C.F.R. § 27.906.

<sup>122</sup> In the *Part 1 Third Report and Order*, the Commission adopted a standard schedule of bidding credits, the levels of which were developed based on its auction experience. *Part 1 Third Report and Order*, 13 FCC Rcd at 403-04 ¶ 47; see also 47 C.F.R. § 1.2110(f)(2).

<sup>123</sup> See *Service Rules Notice*, 17 FCC Rcd at 2550-51 ¶ 145.

found that the use of tiered or graduated small business definitions is useful in furthering its mandate under Section 309(j) of the Act to promote opportunities for and disseminate licenses to a wide variety of applicants.<sup>125</sup> An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

**b. Certain Equipment Manufacturers and Stores**

59. *Part 15 Handset Manufacturers.* Manufacturers of unlicensed wireless handsets may also become subject to requirements in this proceeding for their handsets used to provide VoIP applications. The Commission has not developed a definition of small entities applicable to unlicensed communications handset manufacturers. Therefore, we will utilize the SBA definition applicable to Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment."<sup>126</sup> The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.<sup>127</sup> According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. Of this total, 784 had less than 500 employees and 155 had more than 100 employees.<sup>128</sup> Thus, under this size standard, the majority of firms can be considered small.

60. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment." The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. Of this total, 784 had less than 500 employees and 155 had more

(Continued from previous page) \_\_\_\_\_

<sup>124</sup> See, e.g., *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10091 ¶ 112 (1999).

<sup>125</sup> 47 U.S.C. § 309(j)(3)(B), (4)(C)-(D). The Commission will also not adopt special preferences for entities owned by minorities or women, and rural telephone companies. The Commission did not receive any comments on this issue, and it does not have an adequate record to support such special provisions under the current standards of judicial review. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for government mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a state program based on gender classification).

<sup>126</sup> U.S. Census Bureau, 2002 NAICS Definitions, 334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

<sup>127</sup> 13 C.F.R. § 121.201, NAICS code 334220.

<sup>128</sup> The NAICS Code for this service is 334220. See 13 C.F.R. 121/201. See also [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=500&-ds\\_name=EC0744SSSZ1&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=500&-ds_name=EC0744SSSZ1&-lang=en).